

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

UNITED STATES OF AMERICA

Plaintiff,

v.

CASE NO. 3:21-CR-49-02

DIANA TOEBBE,

Defendant.

DEFENDANT DIANA TOEBBE'S MOTION TO REOPEN DETENTION HEARING

COMES NOW the Defendant, Diana Toebbe, by counsel, pursuant to 18 U.S.C. § 3142(f), and moves the Court to reopen her detention hearing in the above-captioned case. In support thereof, Mrs. Toebbe states the following:

I. INTRODUCTION

On October 20, 2021, the Court conducted a hearing on the Government's motion to detain Mrs. Toebbe. Following the hearing, the Court entered an order granting the Government's motion. [Doc 57]. Since her detention hearing, Mrs. Toebbe has become aware of new information and evidence bearing on the issue of whether there are conditions of release that will reasonably assure her the appearance and protect the safety of any other person or the community. The Court should reopen Mrs. Toebbe' s detention hearing to consider this new information and evidence and then allow for her pre-trial release.

II. RELEVANT LAW

A detention hearing may be reopened at any time if the magistrate judge "finds that information exists that was not known to the movant at the time of the hearing and

that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community." 18 U.S.C. § 3142(f).

III. ARGUMENT AND AUTHORITIES

Since the detention hearing in Mrs. Toebbe's case, she has obtained the following new information and evidence that has a material bearing on whether she should be detained:

A. Newly Disclosed Evidence Shows that Mrs. Toebbe's Previous Desire to Leave the Country was Not Related to Her Husband's Alleged Scheme to Sell Classified Information to a Foreign Government.

At Mrs. Toebbe's detention hearing, the Government introduced in evidence selected instant messages between her and her husband on March 4 and 7, 2019, and October 5, 2020. (Doc 55-15). The messages were obtained from the "Signal" instant messaging application on the cell phone that the Government seized from her husband at the time of his arrest. In the selected messages, Mrs. Toebbe and her husband discussed the possibility of leaving the country, having passports ready, having some savings, and being welcomed by a foreign country. Based on these messages, the Government argued that Mrs. Toebbe was a flight risk if she were not detained. The selected messages, according to the Government, indicated that Mrs. Toebbe's desire to leave the country was motivated by her husband's alleged scheme to sell classified information to a foreign country. The Court considered and relied upon this evidence in denying Mrs. Toebbe's request for pretrial release. (Detention Order, p. 5).

Recently, the Government disclosed additional instant messages between Mrs. Toebbe and her husband which add exculpatory context to the selected messages that

were presented at her detention hearing. A copy of the newly disclosed messages is attached hereto as Exhibit 1. In these newly disclosed messages, which were not previously made available to the defense, Mrs. Toebbe and her husband also stated the following on March 7, 2019:

DT: We need to get out

JT: At least he's doing some hard time. And it's short enough Trump likeley won't try to pardon him - he's clearly already sold Mueller whatever he had.

DT: We need to get out

JT: *sigh* where? To do what?

DT: To anywhere. To do something else

DT: To teach in international schools

DT: To take Macron up on his offer to harbor scientific refugees

JT: Biden/Warren will curb stomp Trump/Pence.

DT: WE NEED TO GET OUT

DT: Hilary was going to curb stomp trump. I'm done

JT: Baby, I don't get what's triggering this now - Manafort's going away. The Mueller report is coming Real Soon™.

DT: It's been too long. Nothing has changed. He's still in power.

JT: Nothing in government moves that fast - believe me, I speak from personal experience.

DT: Manafort got a slap on the wrist. It's a signal that the entire system is rigged

JT: We've got passports, and some savings. In a real pinch we can flee quickly.

DT: Right. Let's go sooner than later

JT: I really don't want to go back to making \$50k a year. Especially not in a country where we don't know the language.

DT: That wouldn't necessarily be how it would be

JT: Realistically, my engineering degree is basically worthless overseas.

DT: You keep saying that but I don't see the evidence. I cannot believe that the two of us wouldn't be welcomed and rewarded by a foreign govt

JT: I'm not a PE, and my specialized knowledge makes it hard to get anything in commercial nuclear... which is just as dead in Europe as here.

JT: Let's talk when I get home.

DT: I'm done talking about it right now. I'm getting angry

JT: Okay. I love you.

(Emphasis added).

Again, the Government did not introduce these additional messages at Mrs. Toebbe's detention hearing. Instead, the Government only offered the following selected messages:

JT: We've got passports, and some savings. In a real pinch we can flee
DT: Right. Let's go sooner than later
JT: I really don't want to go back to making \$50k a year. Especially not in a
DT: That wouldn't necessarily be how it would be
JT: Realistically, my engineering degree is basically worthless overseas.
DT: You keep saying that but I don't see the evidence. I cannot believe that
JT: I'm not a PE, and my specialized knowledge makes it hard to get
JT: Let's talk when I get home.
DT: I'm done talking about it right now. I'm getting angry

For some reason, the selected messages that the Government relied upon at the detention hearing did not include the additional messages between Mrs. Toebbe and her husband in which she explained the actual reason that she wanted to leave the country; that is, her distaste for Donald Trump and not because they were going to flee and avoid charges. As a result, the selected messages had the effect of making it appear that they were discussing fleeing for reasons other than politics.

Obviously, the additional messages paint an entirely different picture as to why Mrs. Toebbe wanted to leave the country. Rather than scheming to escape capture and prosecution for crimes, Mrs. Toebbe was clearly motivated to leave the country for political reasons. Specifically, the additional messages show that Mrs. Toebbe, like many politically left-leaning individuals at the time, was intensely upset with the direction of the country under the former president. These instant messages were sent nearly a year prior to her husband delivering his initial package to "Country1," which occurred on or about April 1, 2020. (Indictment, ¶ 19). Thus, to the extent the messages that were

introduced at her original detention hearing suggested that she was engaged in illegal activity, the newly disclosed messages dispel that implication entirely. Furthermore, the newly disclosed messages show that her reason for wanting to leave the country no longer exists; that is, the former president lost in the last election and is not in office at this time. Therefore, the newly disclosed messages show that she is not a flight risk.

B. Mrs. Toebbe's Father is Willing and Able to Post a \$100,000.00 Cash Bond to Secure Her Release.

Since her detention hearing, Mrs. Toebbe's father, Douglas Smay, who is a retired military officer, has offered to post a \$100,000.00 cash bond to secure her release pending trial. If released, Mrs. Toebbe would reside in her home in Annapolis, Maryland and reunite with her minor children who are presently in the custody of family in California. The children would return to the home to live with her and go back to the schools that they were previously attending. She would also return to her employment as a teacher or, if necessary, seek employment elsewhere. With a \$100,000.00 cash bond, plus electronic monitoring and supervision by the Court, plus her family and community ties, there is little or no risk that Mrs. Toebbe would attempt to flee. Instead, she will be better placed to get health care that she needs and to assist in the defense of this case which she intends to try to verdict.

C. Mrs. Toebbe's Husband has Told her Father and Others that She is Innocent.

After her detention hearing, Mrs. Toebbe's father, Mr. Smay, received a letter from her husband dated November 9, 2021. In the letter, which is attached hereto as Exhibit 2, Mr. Toebbe states: "I have high hopes that Diana will ultimately be exonerated." In addition to this letter, Mrs. Toebbe has reason to believe that her

husband has also informed the Government that she was not involved in his alleged scheme to sell classified information. Considering her husband's statements exculpating her, plus the newly disclosed instant messages showing that she did not want to leave the country for illegal reasons, the weight of evidence against her is significantly, if not totally, diminished. Indeed, the only evidence against her is that she was present with her husband when he made three of the "dead drops." Of course, mere presence at the scene of a crime is not enough to convict a person of the crime. Thus, the weight of the evidence against Mrs. Toebbe does not support detaining her pending trial.

IV. CONCLUSION

Wherefore, Mrs. Toebbe respectfully requests that the Court reopen her detention hearing to consider this new information and evidence and then allow for her pre-trial release.

DEFENDANT
By Counsel

/s/ Barry P. Beck
Barry P. Beck
Power, Beck & Matzureff
308 West Burke Street
Martinsburg, WV 25401
(304) 264-8870

Edward B. MacMahon, Jr.
107 E. Washington Street
PO Box 25
Middleburg, VA 20118
(540) 687-3902

CERTIFICATE OF SERVICE

I, Barry P. Beck, counsel for Defendant, hereby certify that on the 8th day of December, 2021, the foregoing **DEFENDANT DIANA TOEBBE'S MOTION TO REOPEN DETENTION HEARING** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Barry P. Beck
Barry P. Beck